

EXHIBIT A

Page 1

1 UNITED STATES BANKRUPTCY COURT

2 SOUTHERN DISTRICT OF NEW YORK

3 Adv. Case No. 10-04377-smb

4 Adv. Case No. 10-04658-smb

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6 IRVING H. PICARD, TRUSTEE FOR THE LIQUIDATION OF BERNARD L.

7 MADOFF INVESTMENT SECURITIES LLC,

8 Plaintiff,

9 v.

10 NELSON et al.,

11 Defendants.

12 - - - - - x

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14 United States Bankruptcy Court

15 One Bowling Green

16 New York, NY 10004

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18 May 8, 2019

19 10:22 AM

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21 B E F O R E :

22 HON STUART M. BERNSTEIN

23 U.S. BANKRUPTCY JUDGE

24

25 ECRO: NAROTAM RAI

Page 2

1 HEARING re 10-04377-smb TRIAL

2

3 HEARING re 10-04377-smb Motion In Limine Number 1 to Admit

4 the Plea Allocutions of Bernard L. Madoff and BLMIS

5 Employees (also applies to Adv. Proc. No. 10-04658)

6

7 HEARING re 10-04377-smb Motion In Limine Number 2 to Admit

8 the Trial Testimony of Frack DiPascali (also applies to Adv.

9 Proc. No. 10-04658)

10

11 HEARING re 10-04377-smb Motion In Limine Number 3 to Exclude

12 Testimony and Exhibits Related to Defendants Asserted Tax

13 Obligations to Governmental Taxing Authorities (also applies

14 to Adv. Proc. No. 10-04658)

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16 HEARING re 10-04658 TRIAL

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25 Transcribed by: Sonya Ledanski Hyde

Page 3

1 A P P E A R A N C E S :

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3 BAKER HOSTETLER LLP

4 Attorneys for the Trustee

5 45 Rockefeller Plaza

6 New York, NY 10111

7

8 BY: SEANNA R. BROWN

9 NICHOLAS J. CREMONA

10 DEAN HUNT

11 LAN HOANG

12 AMY E. VANDERWAL

13 MAXIMILLIAN S. SHIFRIN

14

15 BAKER HOSTETLER LLP

16 Attorneys for the Trustee

17 811 Main Street, Suite 1100

18 Houston, TX 77002

19

20 BY: MARIE L. CARLISLE

21

22

23

24

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Page 4

1 CHAITMAN LLP
2 465 Park Avenue
3 New York, NY 10022
4
5 BY: HELEN DAVIS CHAITMAN
6 JENNIFER ALLIM

7
8 ALSO PRESENT TELEPHONICALLY:

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10 SEAN DALY
11 DAVID J. SHEEHAN
12 ROBERT A. RICH

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1 P R O C E E D I N G S

2 CLERK: Please be seated.

3 THE COURT: Picard versus Nelson. Is the
4 Plaintiff ready?

5 MR. CREMONA: We are, Your Honor. Good morning.

6 THE COURT: Is the Defendant ready?

7 MR. HUNT: Yes.

8 THE COURT: All right. Why don't we deal with the
9 motions in limine first, which -- and objections, which I've
10 reviewed?

11 MR. CREMONA: Thank you, Your Honor. Nicholas
12 Cremona of Baker & Hostetler appearing on behalf of Irving
13 Picard as the Trustee.

14 As Your Honor indicated, we have several pretrial
15 motions that we'd like to deal with, the first of which I
16 think is one that's rather straightforward from our
17 perspective, but I understand, as Your Honor often says,
18 your perspective in this case often depends upon where you
19 sit.

20 So the motion in limine number 3 is a motion to
21 exclude the testimony of Robert Oppenheim. He is an
22 accountant that has been designated by the defendants, and
23 based on the declaration that was submitted in opposition to
24 our motion, it appears that he would testify that the
25 defendants paid roughly \$5.3 million in taxes based on

Page 6

1 purported gains from their Madoff investments from the years
2 1985 through 2002. We object and move to have him excluded
3 because of several reasons.

4 We don't believe the testimony is relevant. We
5 don't think it's probative to any material or fact at issue.
6 And thirdly, I think when you look at the declaration on its
7 face, it's inaccurate for a couple of reasons, and we can
8 get into that.

9 But first and foremost, I don't think it's
10 relevant to admit his testimony because it will not prove or
11 dispute -- prove a material fact at issue. And secondly, as
12 we said in our papers and as Your Honor will recall, the
13 issue at the end of the day as to whether the -- what the
14 legal effect of the payment of those taxes has been decided
15 by this court at least two times.

16 As Your Honor noted in your Cohen decision, the
17 payment of taxes is not a defense. And moreover, to allow
18 the offset for payment of taxes would only come at the
19 expense of other net loser victims and limit the amount
20 recoverable by the trustee for their benefit, which is his
21 charge. And for those reasons, you noted that it's not a
22 defense. You reiterated that in your (indiscernible)
23 decision stating that the payment of taxes is not a defense.

24 When you look beyond that, Your Honor, if you look
25 at the declaration itself, it says --

Page 7

1 THE COURT: Where is the declaration?

2 MR. CREMONA: It's in -- it's in Exhibit 2, the
3 Defendant's opposition to our motion, and it actually
4 provides in it that -- if you look at Exhibit A to Mr.
5 Oppenheim's declaration, provides that the 5.3 million
6 purportedly paid in gains includes gains on these accounts
7 from the years 1985 through 1991. These accounts were not
8 opened --

9 THE COURT: To 2002.

10 MR. CREMONA: Right, but I'm focused on the 1985
11 period through 1991. These accounts --

12 THE COURT: Okay.

13 MR. CREMONA: These accounts didn't exist, and
14 that aggregates to 2.9 million purportedly in gains that the
15 taxes were paid on. Obviously, that's (indiscernible)
16 inaccurate and I would submit unreliable, and that presents
17 an independent basis to excluded it.

18 If you look then, Your Honor, to TX-24, which is
19 the Defendant's -- one of Plaintiff's Exhibit TX-24, and
20 that's --

21 THE COURT: Can you put it up on the screen? You
22 know, we have a lot of loose leaf here, and I'd appreciate
23 both sides, if you can display the exhibits on a screen.

24 MR. CREMONA: We can do that, Your Honor. And
25 just for the record, that is Carol and Stanley Nelson's

Page 8

1 amended objections and responses to Trustee's first set of
2 requests for admissions.

3 And I would direct Your Honor to Paragraph 13,
4 which starts on Page 5 of 9. And that paragraph references
5 Mr. Oppenheim, and it says that he prepared the tax return
6 for the Defendants from the period 1992 onward. That was a
7 prior admission by the Defendants which Mr. Oppenheim's
8 subsequent declaration actually contradicts, as you can see
9 if you look at the numbers. It purports to indicate that
10 \$3.5 million in net taxes were paid, and the declaration
11 indicates 5.3. It also is -- there's a further discrepancy
12 that the defendants here received a tax refund from the IRS
13 in Connecticut in the amount of 1.5 million in their
14 admission and Mr. Oppenheim at --

15 THE COURT: You know what? You don't want to call
16 him as a witness, and now you're impeaching him.

17 MR. CREMONA: I'm just -- I'm just merely
18 providing independent basis that -- to demonstrate that his
19 testimony is unreliable. I think for the reasons we've
20 stated, legally I think -- based on application of Rules 401
21 and 403 and the prior determinations by Your Honor -- his
22 testimony should be excluded because it will have no
23 material effect on the outcome of the issues before the
24 Court.

25 THE COURT: What's the relevance of the taxes?

Page 9

1 MS. CHAITMAN: The relevance of the taxes is, Your
2 Honor, we believe that the Defendant should not be liable
3 for made-up gains to the extent that the reporting of those
4 gains caused them to be liable to the state and local and
5 federal taxing authorities for 50 percent, essentially, in
6 taxes.

7 And I know that Your Honor, in other cases which
8 are not consolidated with this case, you've ruled against
9 the Defendants on this issue, but it hasn't gone up on
10 appeal. And this is an issue that we are asserting, and
11 we're entitled to a ruling on it. I anticipate that your
12 ruling will be the same, but it's not a consolidated case,
13 and we have a right to that ruling.

14 THE COURT: I understand that. You've made your
15 record. I'm going to exclude the testimony for the reasons
16 I've stated in the prior decisions referred to by Mr.
17 Cremona.

18 The amount of taxes which these defendants and
19 other investors paid is irrelevant to the determination of
20 what was deposited and what was withdrawn within -- capped
21 by the two-year withdrawal. So I'll grant that motion to
22 exclude the accountant's testimony. You've made your
23 record.

24 MS. CHAITMAN: Thank you.

25 THE COURT: Okay.